

UNITED STATES OF AMERICA,

Plaintiff,

v.

George Gabriel, The Palette Ranch, a
general partnership, Dave Turner, d/b/a
Turner Excavating Company, S.P.
Cramer & Associates, Inc., and Ken
Witty,

Defendants.

Civil Action No. _____

COMPLAINT

NATURE OF THE ACTION

1. This is a civil action commenced under Section 309(b) and (d) of the Clean Water Act ("CWA"), 33 U.S.C. § 1319(b) and (d), and Section 11 of the Endangered Species Act ("ESA"), 16 U.S.C. § 1540, to obtain injunctive relief and civil penalties against George Gabriel, The Palette Ranch (a general partnership), Dave

Turner, d/b/a Turner Excavating Company, S.P. Cramer & Associates, Inc., and Ken Witty (hereafter, "Defendants"), for the discharge of pollutants into waters of the United States in Wallowa County, Oregon without authorization by the United States Department of the Army, in violation of CWA section 301(a), 33 U.S.C. § 1311(a), and for violations of ESA section 9(a)(1), 16 U.S.C. § 1538(a)(1).

2. In this action, the United States seeks (1) to enjoin the discharge of pollutants into waters of the United States without a permit in violation of CWA section 301(a), 33 U.S.C. § 1311(a), and ESA section 9(a)(1), 16 U.S.C. § 1538(a)(1); (2) to require Defendants, at their own expense and at the direction of EPA and NOAA, to restore and/or mitigate the damages caused by their unlawful activities; and (3) to require Defendants to pay civil penalties as provided in 33 U.S.C. § 1319(d).

JURISDICTION AND VENUE

3. This Court has jurisdiction over the subject matter of this action pursuant to CWA section 309(b), 33 U.S.C. § 1319(b), ESA section 11(c), 16 U.S.C. § 1540(c), and 28 U.S.C. §§ 1331, 1345, and 1355.

4. Venue is proper in the District of Oregon pursuant to CWA section 309(b), 33 U.S.C. § 1319(b), and 28 U.S.C. § 1391(b) and (c), because the Defendants conduct business in this District, the subject property is located in this District, and the cause of action alleged herein arose in this District.

5. Notice of the commencement of this action has been provided to the State of Oregon pursuant to CWA section 309(b), 33 U.S.C. § 1319(b).

THE PARTIES

6. The Plaintiff in this action is the United States of America. Authority to bring this action is vested in the United States Department of Justice pursuant to 28 U.S.C. §§ 516 and 519, and 33 U.S.C. §

7. Defendant George Gabriel is a private individual residing in Seaford, Delaware, with a mailing address of P.O. Box 916, Seaford, Delaware 19973.

8. Defendant Dave Turner is a private individual residing at 84201 Walker Lane; Joseph, Oregon 97846.

9. Defendant Ken Witty is a private individual residing at 81768 Reavis Lane, Enterprise, Oregon 97828.

10. Defendant The Palette Ranch is a general partnership, of which George Gabriel is a general partner.

11. Defendant S.P. Cramer & Associates, Inc. is a corporation organized under the laws of Oregon with a business address of S.P. Cramer & Associates, Inc., 600 NW Farriss Rd., Gresham, OR 97030.

12. At all times relevant to the Complaint, one or more of the Defendants either owned, leased or otherwise controlled the real property that is the subject of this Complaint and/or otherwise controlled the activities that occurred on such property.

STATUTORY BACKGROUND

Clean Water Act

13. CWA section 301(a), 33 U.S.C. § 1311(a), prohibits the discharge of pollutants into navigable waters except in compliance with, inter alia, a permit issued pursuant to CWA section 404, 33 U.S.C. § 1344.

14. CWA section 404(a), 33 U.S.C. § 1344(a), authorizes the Secretary of the Army, acting through the Chief of Engineers, to issue permits for the discharge of dredged or fill material into navigable waters at specified disposal sites, after notice and opportunity for public comment.

15. CWA section 502(12), 33 U.S.C. § 1362(12), defines "discharge of a pollutant" to include "any addition of any pollutant to navigable waters from any point source."

16. CWA section 502(6), 33 U.S.C. § 1362(6), defines "pollutant" to include, inter alia, dredged spoil, rock, sand and cellar dirt.

17. CWA section 502(7), 33 U.S.C. § 1362(7), defines "navigable waters" as "the waters of the United States, including the territorial seas."

18. 33 C.F.R. § 328.3(a)(1), (2), (3), (5) and (7), and 40 C.F.R. § 232.2, define "waters of the United States" to include: (i) all waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce; (ii) all inter-state waters; (iii) all other waters, such as intrastate lakes, rivers, streams, sloughs

or wetlands, the use, degradation or destruction of which could affect interstate or foreign commerce; (iv) tributaries to such waters; and (v) wetlands adjacent to such waters or their tributaries.

19. 33 C.F.R. § 328.3(b) and 40 C.F.R. §§ 122.2 and 232.2 define "wetlands" as "those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions."

20. CWA section 502(14), 33 U.S.C. § 1362(14), defines "point source" to include "any discernible, confined and discrete conveyance . . . from which pollutants are or may be discharged."

21. CWA section 502(5), 33 U.S.C. § 1362(5), defines "person" to include "an individual, corporation [or] partnership."

22. CWA section 309(b), 33 U.S.C. § 1319(b), authorizes the commencement of a civil action for appropriate relief, including a permanent or temporary injunction, against any person who violates CWA section 301(a), 33 U.S.C. § 1311(a).

23. CWA section 309(d), 33 U.S.C. § 1319(d), authorizes the commencement of an action for civil penalties against any person who violates CWA section 301(a), 33 U.S.C. § 1311(a).

Endangered Species Act

24. The ESA prohibits any person from “taking” any species of fish or wildlife listed as “endangered” within the United States. 16 U.S.C. § 1538(a)(1)(B).

25. The Snake River spring/summer chinook salmon Evolutionarily Significant Unit (“ESU”) has been listed as a “threatened” species under the ESA. 50 C.F.R. § 223.102(a)(1). NOAA Fisheries has specifically extended the “take” prohibition in Section 9 to cover this ESU. 50 C.F.R. § 223.203(a).

26. The ESA defines the term “take” to mean “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.” 16 U.S.C. § 1532(19). NOAA Fisheries has issued regulations further defining “harm” to include significant habitat modification or degradation that actually kills or injures fish or wildlife by significantly impairing essential behavioral patterns, such as breeding, spawning, rearing, migrating, feeding, or sheltering. 50 C.F.R. § 222.102.

27. “Taking” a species protected under the ESA can be authorized either through the issuance of an incidental take permit pursuant to Section 10 of the ESA, 16 U.S.C. § 1539(a)(1)(B), or through the issuance of an incidental take statement received at the conclusion of consultation between a federal action agency and NOAA Fisheries or the United States Fish and Wildlife Service. 16 U.S.C. § 1536(b)(4).

28. The ESA defines “person” to include “an individual, corporation, partnership, trust, or any other private entity;. . . or any other entity subject to the jurisdiction of the United States.” 16 U.S.C. § 1532(13).

GENERAL ALLEGATIONS

29. From July 1997 through August 1997, one or more of the Defendants and/or persons acting on their behalf, discharged dredged or fill material into waters of the United States without a permit under CWA section 404 at a ranch on the Imnaha River owned and operated by George Gabriel in Wallowa County, Oregon (hereinafter referred to as the “Gabriel Ranch”). The discharge of this material cut off numerous side-channels from the main channel of the Imnaha River, stranding juvenile salmonids; degraded spawning habitat and refugia for juvenile salmonids; disconnected the Imnaha River from areas of the flood plain of the river; and otherwise significantly modified or degraded habitat of threatened Snake River spring/summer chinook salmon.

30. The portion of the Imnaha River where the activities in Paragraph 29 took place has been designated a Wild and Scenic river under the Wild and Scenic Rivers Act. 16 U.S.C. § 1274(a)(78).

31. The dredged or fill material that one or more of the Defendants and/or persons acting on their behalf, caused to be discharged includes, among other things, dirt, spoil, rock and sand, all of which constitute “pollutants” as defined in CWA section 502(6), 33 U.S.C. § 1362(6).

32. One or more of the Defendants and/or persons acting on their behalf used mechanized land-clearing and earth-moving equipment to accomplish the discharges. This equipment constitutes "point sources" as defined in CWA section 502(14), 33 U.S.C. § 1362(14).

33. Defendants did not obtain a permit from the Secretary of the Army, acting through the Chief of Engineers, for the discharges of dredged or fill material into waters of the United States as required by CWA sections 301(a) and 404, 33 U.S.C. §§ 1311(a), 1344, or an incidental take permit or incidental take statement as required by the ESA.

34. One or more of the Defendants either owned, leased or otherwise controlled the land on which each unauthorized discharge of dredged or fill material into waters of the United States occurred.

35. One or more of the Defendants conducted, contracted for, supervised and/or otherwise controlled the unauthorized activities at issue in Paragraph 29.

36. Defendants are persons within the meaning of CWA section 502(5), 33 U.S.C. § 1362(5), and ESA section 3(13), 16 U.S.C. § 1532(13).

37. Defendants have violated and continue to violate CWA section 301(a), 33 U.S.C. § 1311(a), and ESA section 9(a)(1)(B), 16 U.S.C. § 1538(a)(1)(B) by their unauthorized discharges of dredged or fill material into waters of the United States, specifically, the Imnaha River and adjacent wetlands, at the Gabriel Ranch.

38. Each day that such material remains in place constitutes a separate violation of CWA section 301(a), 33 U.S.C. § 1311(a).

39. Unless enjoined, Defendants are likely to continue to discharge dredged or fill material into and/or to allow dredged or fill material to remain in the Gabriel Ranch in violation of CWA section 301, 33 U.S.C. § 1311, and ESA section 9(a)(1)(B), 16 U.S.C. § 1538(a)(1)(B).

PRAYER FOR RELIEF

WHEREFORE, the Plaintiff, the United States of America, respectfully requests that this Court order the following relief:

That the Defendants be permanently enjoined from discharging or causing the discharge of dredged or fill material or other pollutants into any waters of the United States except in compliance with the CWA and the ESA;

That the Defendants, or any combination thereof, be enjoined to undertake measures, at Defendants' own expense and at the direction of the Environmental Protection Agency and the National Oceanic and Atmospheric Administration, to effect complete restoration of the Gabriel Ranch Site and/or to conduct off-site mitigation for irreversible environmental damage, as appropriate;

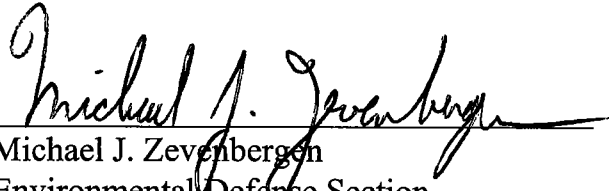
That the Defendants be assessed pursuant to CWA section 309(d), 33 U.S.C. § 1319(d), a civil penalty for each day of each violation of CWA section 301(a), 33 U.S.C. § 1311(a);

That the United States be awarded costs and disbursements in this action; and

That this Court grant Plaintiff, the United States of America, such other relief as the Court may deem just and proper.

Respectfully submitted,

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